

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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ROBERT HERTULAR,

Petitioner

- v -

UNITED STATES OF AMERICA,

Respondent.

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NAOMI REICE BUCHWALD  
UNITED STATES DISTRICT JUDGE

USDC SDNY  
DOCUMENT  
ELECTRONICALLY FILED  
DOC #:  
DATE FILED: 1/14/2011

ORDER

S2 04 Cr. 009 (NRB)  
10 Civ. 7380 (NRB)

**WHEREAS** on December 29, 2009, this Court re-imposed a sentence of 400 months imprisonment on petitioner Robert Hertular (Dkt. No. 52); and

**WHEREAS** on September 27, 2010, Hertular filed a petition to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255 (the "Petition"); and

**WHEREAS** in Ground Two of the Petition, Hertular asserts that his counsel failed to file a notice of appeal despite Hertular's (and the Court's) request that he do so (Petition at 18-19); and

**WHEREAS** no notice of appeal was filed on Hertular's behalf; and

**WHEREAS** in a November 24, 2010 letter to this Court, the Government stated that it had spoken with Hertular's former counsel, who "advised that the omission [of the notice of appeal] was a result of an oversight on his part" (Letter from the Government to the Court, Nov. 24 2010 ("Gov. Ltr."), at 2); and

**WHEREAS** "counsel's failure to file a timely appeal in a criminal case, when requested by a defendant, constitutes ineffective assistance of counsel, entitling the defendant to relief" (United States v. Fuller, 332 F.3d 60, 64 (2d Cir. 2003)(abrogated on other grounds by United States v. Frias, 51 F.3d 229, 231 (2d Cir. 2008)); see also United States v. Medley, 300 Fed. Appx. 14, 15-16 (2d Cir. 2008)); and

**WHEREAS** when counsel has failed to follow a defendant's request to file a notice of appeal, the Second Circuit has stated that "the most appropriate disposition is to dismiss the appeal as untimely and remand to the District Court with instructions to vacate the judgment and enter a new judgment from which a timely appeal may be taken" (Fuller, 332 F.3d at 65); and

**WHEREAS** both petitioner and the Government request that this Court enter a new judgment imposing the same sentence as that imposed on December 29, 2009, and that the Court defer adjudication of petitioner's remaining claims while his appeal

is pending (see Gov. Ltr. at 2-3; Hertular's Reply to Government's Letter Response to 28 U.S.C. § 2255 Motion, Dec. 3 2010 ("Hertular Reply"), at 2)); and

**WHEREAS** Hertular requests that this Court appoint counsel both for the purposes of filing a notice of appeal and for representation throughout the appellate proceedings (Hertular Reply at 2), and

**WHEREAS** the Government requests that this Court appoint counsel for the limited purpose of filing a notice of appeal (Gov. Ltr. at 3); and


**WHEREAS** Hertular has, in a separate filing dated October 7, 2010, moved for a refund of a \$100 special assessment (plus interest) that he had paid as part of his sentence for his conviction on Count 3 of the Superseding Indictment, a conviction that was reversed by the Second Circuit (Defendant's Motion for Refund and Interest, Oct. 7, 2010); and

**WHEREAS** Hertular has also moved for "an additional award of \$200.00 for deprivational of use" (Id.); it is hereby

**ORDERED** that (1) this Court's December 29, 2009 judgment is vacated; (2) a new judgment imposing the same sentence as that imposed in the December 29, 2009 judgment is entered; (3) Hertular is appointed counsel for the limited purpose of filing a notice of appeal; and (4) the Clerk of this Court will

reimburse Hertular the \$100 special assessment he paid as part of his sentence for Count 3 of the Superseding Indictment.

Dated: New York, New York  
January 13, 2011

  
NAOMI REICE BUCHWALD  
UNITED STATES DISTRICT JUDGE

A copy of the foregoing Order has been mailed on this date to the following:

**Petitioner**

Robert Hertular, Register # 52319-054  
FCI Butner Medium II  
Federal Correctional Institution  
P.O. Box 1500  
Butner, NC 27509

**Respondent**

Ivan Stephen Fisher  
125 East 50th Street, Suite 301  
New York, NY 10022

**For the Government**

Anirudh Bansal

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